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Supreme Court of the United States

OCTOBER TERM—1944

No. 254 69

LILLIAN BOEHM,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

LOUIS BOEHM,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals, for the Second Circuit, entered in the above case on February 10, 1945, modifying the order of The Tax Court of the United States which determined the presence of a deficiency in the 1937 income tax return of petitioner.

Summary Statement of the Matter Involved

There are no facts in dispute. No evidence was presented before The Tax Court. The case was submitted on an agreed statement of facts (79-96*), and therefore presents only a question of law.

* Parenthetical references are to folio numbers unless otherwise noted.

In 1929 taxpayer bought stock of The Hartman Corporation at a cost of $32,440 (80-81). In June, 1932 equity receivers were appointed for the Corporation (81). In December, 1932 taxpayer and eight other stockholders instituted a derivative stockholders' action against the directors requesting an accounting for their misconduct (88, 252). From 1933 to 1936 the action was vigorously prosecuted and substantial disbursements were incurred by taxpayer and the other plaintiffs (88-90). In February, 1937 the suit was settled for $50,000 (91). Taxpayer's share of the settlement, after payment of counsel fees and expenses, amounted to $12,500. In her income tax return for 1937 she claimed a deduction from gross income in the amount of $19,940, being the difference between $32,440, the cost of the stock, and $12,500, the amount of her recovery, as a loss due to the worthlessness of her Hartman stock. This loss was denied by the Commissioner. His action was upheld by the Courts below.

The Tax Court of the United States rendered an opinion (241-266) on October 23, 1943, and entered its order on December 18, 1943.

This Court Has Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347a). The judgment of the Circuit Court of Appeals was entered February 10, 1945 (p. 122). This petition, presented within three months after the entry of the aforesaid order, is timely.

The decision of the Circuit Court of Appeals in this case is in direct conflict upon a question of Federal law with the decision of the United States Court of Appeals for the District of Columbia in *Smith* v. *Helvering*, 141 F. 2d,

529. The Court below, in its opinion, said:

> "The petitioner further argues that the question to be determined is not whether the stock actually became worthless before 1937 but whether she honestly believed that it had some value until settlement of the litigation. This court has approved the objective rather than the subjective test in determining the worthlessness of stock. (Citing cases.) In the *Mahler* opinion we said that a taxpayer must claim his deduction 'in the year in which events are such as to furnish convincing evidence that the stock has, in fact, become worthless in that year.' In so far as *Smith* v. *Helvering*, 141 F. 2d 529 (C. A. D. C.) adopts the subjective test we must respectfully disagree with it" (R. pp. 105-106).

In *Smith* v. *Helvering*, 141 F. 2d 529, the Court of Appeals for the District of Columbia, applied the "subjective test," namely, the honest belief of the taxpayer as evidenced by his conduct, and held that the year in which the *taxpayer* actually ascertained the stock to be worthless was the determining factor.

Thus, the question presented is whether the *objective* test, that is, the test based upon worthlessness in the light of subsequent events (in other words, hindsight), or the *subjective* test (that is, the test based upon what the taxpayer actually thinks at the time and acts upon) is to be used to determine the year in which stock is worthless for the purpose of deducting taxpayer's loss.*

---

* The pertinent statute and regulations involved are printed in the appendix to the brief in support of the within petition. In *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, it was held that subsequent changes in the taxing statute were unimportant on the issue of whether a writ should be granted. In fact, however, the same question presented herein arises under the present tax statutes.

Reasons for Granting the Writ

The decision of the Circuit Court of Appeals is in direct conflict, on a question of Federal law, with the decision of the United States Court of Appeals for the District of Columbia in *Smith* v. *Helvering,* 141 F. 2d 529. In the instant case the Court held that the *objective* test was to be used in determining the year in which stock became worthless. In *Smith* v. *Helvering,* the United States Court of Appeals for the District of Columbia, held that the *subjective* test was to be used. In the instant case, the Circuit Court of Appeals specifically refused to follow the decision of the United States Court of Appeals for the District of Columbia.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, should be granted.

Dated, New York, May 9, 1945.

LOUIS BOEHM,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM—1944

No. . . . . .

LILLIAN BOEHM,

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against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION

The Opinions Below

The memorandum opinion of The Tax Court of the United States (241-266) is not reported. The opinion of the Circuit Court of Appeals (pp. 102-106) is reported in 146 F. 2d 553.

Jurisdiction

The relevant facts with regard to the jurisdiction of this Court are stated in the petition.

The conflict between the decision of the Circuit Court of Appeals in this case and the Court of Appeals for the District of Columbia in *Smith* v. *Helvering*, 141 F. 2d 529, is set forth in the petition.

In *Jurisdiction of the Supreme Court of the United States* by Robertson and Kirkham, the authors at page 676, Sec-

tion 327, state the rule thus:

> "Conflicts of decision between the Court of Appeals for the District of Columbia and the Circuit Courts of Appeals, occurring generally in cases involving federal taxes, are grounds for the issue of the writ either to the District of Columbia Court of Appeals or the Circuit Courts of Appeals." (Citing *Helvering* v. *Grinnell*, 294 U. S. 153, *British-American Tobacco Co.* v. *Helvering*, 293 U. S. 95, and Porter v. Commissioner of Internal Revenue, 288 U. S. 436.)

Statement of the Case

In 1929 the petitioner purchased 1,100 shares of the Class A stock of The Hartman Corporation, hereinafter called Hartman, for $32,440. Hartman was incorporated in 1916 in the State of Virginia and acquired the capital stock of the Hartman Furniture and Carpet Company, hereinafter referred to as Hartman (Illinois), and its affiliates, which were engaged in the business of selling furniture, carpets and household goods (80-81, 244-245).

On December 31, 1931, Hartman had total current assets as shown by its consolidated balance sheet of $8,978,091.22, and total assets of $15,401,097.97; current liabilities of $4,198,813.26, plus other miscellaneous liabilities, making total obligations of $4,740,438.47, leaving a net worth of $9,410,659.59, in addition to a reserve for contingencies of $1,250,000 (178-186).

On May 4, 1932 Hartman advised its stockholders that borrowed moneys had been reduced by $575,000 since January 1, 1932, thereby reducing borrowed moneys to a new low since 1924 (192).

In June, 1932, Martin L. Straus and Elias Mayer were appointed equity receivers for Hartman by the U. S. District Court for the Northern District of Illinois, Eastern Division. The receivers entered into possession of the

property of Hartman and continued its business of buying and selling furniture and other household articles from the time of their appointment until on or about May 26, 1933 (81, 245).

The bill of complaint requesting the appointment of equity receivers for Hartman alleged that the corporation's assets were greater than its liabilities, but that it was temporarily unable to meet its current obligations, and that by reason thereof, it prayed for the protection of a court of equity and the appointment of equity receivers to take possession of its property and assets, and to continue its business of buying and selling furniture and other household goods (106, 121, 131).

In the bill of complaint in said action, it was further alleged "that said assets upon thus being administered in a court of equity, through said receivership, will be sufficient to pay in full all liabilities against said defendant, and that a surplus will be left for the benefit of defendant's stockholders" (131-132). These allegations of the bill of complaint were admitted to be true by Hartman (152).

A suit against the directors, hereinafter called the Graham suit, was instituted on December 16, 1932 in the New York Supreme Court. The petitioner and eight other stockholders of Hartman were plaintiffs. The defendants were the corporation, Hartman, and nine directors. The plaintiffs brought the suit "on behalf of themselves as stockholders of the Hartman Corporation and on behalf of the said Company and all other stockholders of said Company similarly situated, who may join with the plaintiffs in, and contribute to the expenses of, this suit" (88, 252). The complaint charged the defendants with waste and mismanagement and demanded that the defendants render an accounting and pay into the treasury of the corporation the amount of the loss and damage sustained by it by reason of their wrongful acts (225-226, 253).

More specifically, the complaint alleged that during the years 1929 and 1930 the directors and officers of Hartman caused it to purchase in the open market for cash, 64,789 shares of its Class B, or junior, stock at an average cost of $22 per share and at an aggregate cost of $1,422,000 (227). The complaint alleged that part of this Class "B" stock was purchased by the corporation from the individual directors and officers (230). It was also alleged that the directors, without the knowledge of the stockholders, caused the corporation thereafter to sell the Class "B" stock to its employees (including its officers and directors), at a price of $16 per share, $6 per share less than the cost of the stock, with an agreement by the corporation to repurchase the stock, *at the option of the officers, directors and employees,* at the cost to them. Thereafter, the stock became worthless. The corporation repurchased large amounts of the stock at the price of $16 per share, and then retired the stock (231-232). The entire amount of $1,422,000 expended for the stock was lost (227-233).

It is interesting to compare the corporation's loss on 64,879 shares of stock aggregating $1,422,000 with the total liabilities of the corporation amounting to $630,574 (250) at the termination of the equity receivership. The recovery on this single element of wrongdoing, exclusive of all other acts of mismanagement, would have been more than twice the total of all the liabilities of the corporation. This conclusively demonstrates that a substantial equity remained for the stockholders in the cause of action against the directors.

In 1933 a new corporation called Hartman's, Inc., was organized under the laws of the State of Delaware. As of May 26, 1933 Hartman's, Inc. purchased at a bankruptcy sale the assets of Hartman (Illinois), the wholly owned subsidiary of Hartman, for the sum of $501,000 in cash and an agreement to procure a waiver of certain inter-company claims against the bankrupt estate. The stock of the new

company was issued to the creditors of Hartman (Illinois) in settlement of claims, and to the stockholders of Hartman by subscription thereto. The stockholders of Hartman were given the right to subscribe for debentures and stock of Hartman's, Inc. in 1933 (196-208). Petitioner did not exercise this right of subscription (82-84, 247-248).

On August 10, 1934, the receivers of Hartman filed a report with the court listing as assets $39,593.13 in cash and *a suit pending against the directors* (the Graham suit), and as liabilities total outstanding claims amounting to $707,430.67. The receivers recommended that claims totalling $630,574.57 be allowed (84-85, 248). The receivers filed a second report on July 11, 1935, listing as assets $27,192.51 in cash *and the Graham suit pending against the directors,* and as liabilities the aforesaid claims. The receivers recommended that a dividend of 4 per cent be paid on the claims of $630,574.57 allowed, which was paid (86, 249).

During the years 1933 to 1936, inclusive, in connection with the prosecution of the Graham suit, examinations before trial of certain of the directors were held from time to time in New York City. Petitioner's counsel also went to Chicago, Illinois, during this period and spent four days there on the examination before trial of certain of the defendants who resided in that City (88-89). In the course of such examinations before trial, many hundreds of pages of testimony were taken and numerous exhibits were offered in evidence (89). Petitioner and the other plaintiff stockholders were ordered by the New York Supreme Court to pay the counsel fees, transportation and hotel expenses of the *defendant's* New York counsel who traveled to Chicago and represented said defendants on such examinations (90). Such counsel fees and expenses of defendants' counsel amounted to approximately $800 (89). Petitioner and the other plaintiff stockholders also paid the transportation and hotel expenses of their own counsel in attending upon such examinations, and also paid the fees

of the stenographer who took down and transcribed the testimony of such defendants, and also paid the fees of the commissioner before whom the examinations were held (90). Petitioner and other plaintiff stockholders also paid for the cost of printing briefs in the Appellate Division of the New York Supreme Court on an appeal which defendants had taken to such Court (90). The amount of disbursements paid by petitioner and the other plaintiff stockholders, exclusive of the fees of their own counsel, amounted to approximately $2,000 (90).

At the conclusion of the examinations and shortly before the trial, negotiations were commenced for a settlement of the action, and on February 20, 1937 such settlement was consummated. Under its terms the defendants directors paid the petitioner and the other plaintiff stockholders the sum of $50,000 in full settlement and discharge of the claims and cause of action of the petitioner and her co-plaintiffs. In connection with the settlement the petitioner and the other stockholders released all their rights and claims arising out of the acts committed by the defendants as alleged in the complaint. The suit was thereafter dismissed on May 14, 1937 (91, 257-258).

After the settlement of the Graham suit the receiver filed a final report with the court on September 30, 1937, and he was thereafter discharged by an order dated September 30, 1937 (86-87, 250).

Petitioner's proportionate share of the $50,000, after payment of counsel fees and expenses, amounted to $12,500. In her income tax return for 1937 she claimed a deduction from gross income in the amount of $19,940, being the difference between $32,440, the cost of the stock, and $12,500, the amount of her recovery, as a loss due to the worthlessness of her Hartman stock. The respondent denied the deduction and included in her gross income for that year the sum of $12,500 which she received pursuant

to the settlement (92-94, 258-259). The Circuit Court of Appeals held that the $12,500 constituted a partial recovery of the cost of the taxpayer's stock and was, therefore, not taxable as income. However, it held that the balance of $19,940, representing the unrecovered cost, was a loss which could not be deducted in 1937.

Specification of Errors

The errors which the petitioner will urge, if the writ of certiorari is allowed, are that the Circuit Court erred in holding that the *objective* test was solely to be used in determining the year in which stock became worthless, and that the taxpayer's honest belief, as shown by her conduct in vigorously prosecuting the Graham suit to a successful conclusion in 1937, was not to be considered.

Summary of Argument

The Circuit Court of Appeals in the instant case refused to follow the rule in *Smith* v. *Helvering,* 141 F. 2d 529, which held that the *subjective* test was to be employed in ascertaining the year in which stock became worthless, and a conflict exists between the Circuit Court of Appeals, Second Circuit, and the United States Court of Appeals for the District of Columbia on an important question of tax law, which should be resolved by this honorable Court.

POINT I

Petitioner in good faith believed that her stock had value until 1937 when the Graham suit was settled. Upon the settlement, petitioner executed general releases to the directors and the stock ceased to have further value.

We respectfully submit that taxpayer's honest belief that her stock had a value until 1937 (when she released the directors from liability and recovered $12,500 as her proportionate share of the settlement) entitles her to deduct the loss from her 1937 income.

It was stipulated in the Tax Court that extensive services were rendered in the prosecution of the Graham suit over a period of four years from 1933 to 1937 (88-92). Petitioner's counsel spent four days in Chicago in examining certain defendants who resided in that city (88). Certain of the defendants were examined in New York (89). Many hundreds of pages of testimony were taken and numerous exhibits offered (89). Petitioner and the other complaining stockholders were required to, and did pay, the fees of various New York counsel for defendants in attending the examinations in Chicago, as well as their traveling and hotel expenses, and those of their own counsel (89). They paid the fees of the Commissioner before whom the depositions were taken, as well as those of the stenographer who took them (90). They paid for the printing of briefs in an appeal to the Appellate Division of the New York Supreme Court. Petitioner and her co-plaintiffs paid disbursements of approximately $2,000, exclusive of counsel fees, in the prosecution of the action (88-90). Petitioner's good faith and confidence in the litigation which she had brought against the directors was attested by the payment of substantial disbursements incurred in the prosecution of the action, as well by her willingness to incur substantial

counsel fees for her own counsel in connection with the extensive services rendered.

Under these circumstances, we respectfully submit that petitioner should have been permitted to deduct her loss on the stock in the year in which she believed it to be worthless. In *Smith* v. *Helvering*, 141 Fed. (2d) 529, which the Court below specifically refused to follow, the United States Court of Appeals for the District of Columbia clearly ruled that the taxpayer's opinion and belief as evidenced by his acts are decisive of the year in which a worthless stock loss should be deducted.

In *Smith* v. *Helvering, supra*, the Commissioner determined a deficiency against the taxpayer for the calendar year 1937. The taxpayer deducted a loss on certain stock of San-i-Sal Laboratories, Inc., in the year 1937. It was shown that the corporation's business was suspended early in 1929 and that thereafter it had no full time employees and filed no Federal income tax return. It was shown that from 1925 to 1937 the petitioner advanced funds on behalf of the corporation. In 1937 a Certificate of Dissolution was filed with the Secretary of State of Delaware. It was not disputed that the corporation was insolvent prior to 1937. The Board of Tax Appeals stated that "the loss must be taken in the year in which it was sustained and at no other time" and this means the year in which these shares in every substantial and realistic way became worthless. In reversing the Board of Tax Appeals, the Court, per Justice Miller, stated at page 530:

> "We think the decision of the Board too severely restricted the taxpayer and sets too high a standard of industrial performance; especially in light of the remarkable industrial developments often achieved by courageous and optimistic American businessmen, who refused to be dissuaded when bankers and other conservative citizens advised that their enterprises were worthless in 'every substantial and realistic way.' Henry Ford is a striking example. Even though,

perhaps, a businessman should not be encouraged to be an incurable optimist, if he is one, nevertheless, and continues to express his optimism by putting money into an insolvent organization, he should be given the benefit of the doubt. This would seem to be particularly true where, as here, the suspension of business occurred in 1929, the year of the great panic, and the transfusions administered by the taxpayer occurred during the period of the most severe depression ever experienced in this country.

"The case which comes closest in its facts to the present case is *Rassieur* v. *Commissioner* [129 F. 2d 820]. The nub of the decision appears in the following language: 'So long as taxpayer was willing to protect or pay the company debts and to advance funds for its current expenses, no one could say that any "identifiable events" had occurred which finally determined the worthlessness of the stock.' The language of that opinion which immediately precedes the statement quoted is remakably apt: 'The panic struck this, as all other business, like a blight. Its business decreased and its owned securities diminished drastically in market value while expenses and indebtedness continued. In the endeavor to weather the storm and continue the business, various steps were taken, such as progressive restriction of business, curtailment of expenses, and sale of the "market service." It is evident that there was no time from 1931 to dissolution when it could have converted its assets, paid its debts and had anything remaining for stock value if it had been compelled to rely only upon its own resources and to liquidate. From the latter part of 1931, it could not have continued in business or paid its debts when due if it had been compelled to rely solely upon its own resources. However, the actual fact was that it did not have to so rely on its own resources alone. While there was neither legal nor moral obligation so to do, yet there were strong reasons of self-interest and probably of sentiment (help to his son) which impeled Theodore Rassieur to come to the financial aid of the company and he did so. The sole purpose of these two reasons was the same—to preserve the business. Unless that could be done, the taxpayer stood

to lose at least the $250,000 he had contributed (for himself and the two others) to the capital stock; and his son would be out of business. The mere winding up of this business would have defeated the purpose entirely. There can be no question that this purpose to preserve the business was the dominant moving consideration of these three men, who held all of the capital stock, during this entire period. The accomplishment of the purpose depended entirely upon the willingness of taxpayer to make advances. As long as he continued willing, the business would last. As long as it lasted, there was a prospect of its successful survival.'"

The Court then specifically held that the test that should be applied in determining the year in which the stock became worthless was a *subjective* and not an *objective* standard. The Court said, at p. 531:

"The test proposed by the Board in the present case is a highly objective one which disregards what the taxpayer may think of his investment, how much of an optimist he may be, or what he may consider to be the possibilities of future successful operation, or of eventual recoupment. An examination of the cases persuades us that the subjective appraisal of the taxpayer is of much greater importance. The Supreme Court said as much in *United States* v. *S. S. White Dental Manufacturing Company* [274 U. S. 398]. In *Forbes* v. *Commissioner*, Judge Parker, speaking for the Court of Appeals of the Fourth Circuit and reversing a decision of the Board in a similar case used the following language: 'Practical considerations must govern, for it is as true here as in Lucas v. American Code Co., 280 U. S. 445, 449, * * * that: "No definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test." * * * As said by Judge Learned Hand in de Loss v. Commissioner (C. C. A. (2d) 28 F. (2d) 803, 804), "So far as *human foresight* could go, the shares were worthless, and the petitioner might have

deducted the loss." We are not dealing with a case where *there was hope* that a business although involved *might be saved* and value in the stock established. *Hope* had been abandoned and *liquidation had been ordered.*' (Italics supplied.) In *Lucas* v. *American Code Company,* the Supreme Court pointed out that the test which should be applied is a practical and not a legal one. In that case the loss which was paid by the taxpayer in 1923 resulted from a breach of contract which occurred in 1919. The Court upheld a determination of the Board that the deduction could not be taken in 1919 because of the various possibilities which then existed affecting the amount of the recovery which might be, eventually, obtained against the company. Among other things the Court listed, as evidencing the attitude of the taxpayer, that it did not accrue on its books during the tax year of 1919 any liability in the estimated amount of the loss; and that reserves set up by the taxpayer during that year bore no relation to the apprehended loss. The Court concluded by saying: 'It cannot be said that the loss actually paid by the Company in 1923 was, as a matter of law or of undeniable fact, sustained in 1919. *Nor did the Company so regard it.*' (Italics supplied.) If the taxpayer's attitude is a proper subject of appraisal in one case it should be in another. Similarly, in *Benjamin* v. *Commissioner* [70 F. 2d 719], a subjective test was applied. It was held that the mere shutting down of a mill and suspension of business—other than prospecting for additional soapstone deposits—was not sufficient to show a complete loss; and this in spite of the fact that no deposits were actually uncovered. The court held that while *hope* and *possibility of success* remained, proof of loss was not complete. In the present case, if we reason from the taxpayer's attitude, hope had not been abandoned and possibility of success remained."

In the instant case, the petitioner did not believe that her stock was worthless prior to 1937. No other inference can be drawn from the conceded facts. Petitioner and the other stockholders who were plaintiffs in the Graham suit

employed counsel and advanced substantial sums of money in prosecuting what they considered a meritorious cause of action on behalf of the corporation. Expenditures, exclusive of counsel fees, amounted to approximately $2,000. Would the petitioner and the other plaintiff stockholders have spent at least $2,000 for disbursements, exclusive of counsel fees, in prosecuting a cause of action had they considered the stock worthless? So long as the petitioner spent substantial sums of money in asserting her rights as a stockholder, we do not believe it can be reasonably asserted that she believed her stock to be worthless.

We do not contend that the *subjective* test should be based merely upon the unsupported opinion or belief of the taxpayer. We do contend, however, that where there is a reasonable basis for the taxpayer's belief that his stock has not become worthless and that opinion is confirmed by affirmative conduct on the part of the taxpayer which is irreconcilable with a contrary conclusion, then we respectfully submit that the *subjective* test as to when the stock has become worthless is the proper test to be applied. This is particularly true when, as in the instant case, *the taxpayer's opinion was by the actual course of events demonstrated to be correct.* The recovery by the taxpayer, and the other plaintiffs in the Graham suit, of the sum of $50,000 in 1937 demonstrates the correctness of the taxpayer's opinion that her stock had not become worthless prior to that year.

We respectfully submit, in view of the direct conflict between the decision of the Circuit Court of Appeals in this case and the decision of the Court of Appeals of the District of Columbia in *Smith* v. *Helvering* (*supra*), it is essential in the public interest that the law on this disputed question shall be finally settled by this honorable Court. Unless this is done, the administration of the tax law on the difficult and important question when a worthless security loss should be taken will remain in doubt and

confusion, and taxpayers will be unable to determine just when they should take their losses in connection with worthless securities. We respectfully submit, therefore, that it is a matter of public importance that this honorable Court should grant a writ of certiorari herein and determine, once and for all, the law of the land in respect to what the Court below itself has said is a "troublesome question."

CONCLUSION

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

LOUIS BOEHM,
Attorney for Petitioner.

Appendix

Revenue Act of 1936, c. 690, 49 Stat. 1648:

* * * * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * *

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business;

* * * * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 23 (e)—1. Losses by individuals.—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if * * * (b) incurred in any transaction entered into for profit, or * * * (d) if not prohibited or limited by any of the following sections of the Act: * * * section 117, relating to limitation on losses recognized by section 112 upon the sale or exchange of capital assets; * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. * * *

ART. 23 (e)—4. Shrinkage in value of stocks.—A person possessing stock of a corporation can not deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered

when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis as determined and adjusted under section 113 is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness. * * *